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Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GARY DALE HINES,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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November 18, 1997

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CAPITAL CASE
QUESTIONS PRESENTED

(1) Is a criminal defendant deprived of his right to counsel as guaranteed by the Sixth Amendment to the United States Constitution by his counsel's conflict of interest, when counsel is appointed directly by the court in which the defendant is to be tried and must choose between his client's interest in vigorous advocacy and his own financial interest in ensuring future court appointments?

(2) Is a defendant denied his privilege against self-incrimination and his right to the assistance of counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, when the acts of his counsel and the trial court coerce him into testifying against his wishes?

(3) Are capital defendants in California denied their rights under the Eighth and Fourteenth Amendments by the California Supreme Court's refusal to employ its statutory power to reduce sentences in cases where a sentence of death has been imposed at trial?

Petitioner GARY DALE HINES respectfully prays that a petition for writ of certiorari issue to review the judgment of the Supreme Court of California entered on June 26, 1997 and final as of August 20, 1997.

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I. JUDGMENT BELOW

The decision of the Supreme Court of California in *People v. Gary Dale Hines*, No. S006640, affirming Petitioner's convictions and death sentence is attached hereto as Appendix A. The opinion is published at 15 Cal.4th 997 (1997), 64 Cal.Rptr.2d 594, 938 P.2d 388. The Court's modification of opinion filed August 20, 1997, which did not alter the judgment, is attached hereto as Appendix B.

The Order denying Petitioner's timely filed petition for rehearing, also entered on August 20, 1997, is attached hereto as Appendix C.

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and Rule 13 of the Supreme Court. The opinion below was filed on June 26, 1997 and modified on August 20, 1997 (Appendix B). A timely petition for rehearing was denied (Appendix C) and the remittitur was filed on August 20, 1997 (Appendix D).

III. CONSTITUTIONAL PROVISIONS

The United States Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

The United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

The United States Constitution, Amendment VIII:

". . . nor cruel and unusual punishments inflicted."

The United States Constitution, Amendment XIV

Section 1:

". . . [n]or should any State deprive any person of life, liberty, or property, without due process of law; . . . ."

IV. STATEMENT OF THE CASE

On December 16, 1986 GARY DALES HINES ("Petitioner") was charged by Information No. 77733 with the following charges: (1) violation of California Penal Code[1/] Section 187(a) in the death of Donna Roberts; (2) violation of Section 187(a) in the death of Kathryn Roberts (the mother of Donna Roberts); (3) including special circumstances to wit, violation of Section 190.2(a)(17)(vii) in that both deaths occurred during the course of a burglary in the first degree as defined by Section 460, violation of Section 190.2(a)(17)(i) in that the deaths occurred during the course of a robbery as defined by Section 211, and violation of Section 190.2(a)(3) in that the Petitioner is being charged with multiple deaths; (4) violation of Section 459, burglary, in entering the residence of the decedents with the intent to commit larceny therein with the enhancement that Petitioner used a firearm in violation of Section 12022.5; (5) violation of Section 211, robbery, in that Petitioner, by means of force and fear, did take the personal property of the decedents while in their

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1/ Unless otherwise stated all code sections referred to herein are to the California Penal Code.

immediate presence with the enhancement that Petitioner used a firearm in violation of Section 12022.5; (6) violation of Section 487.3, grand theft, in that Petitioner took one automobile which was the property of Lawrence Roberts; and (7) violation of Section 12021 in that Petitioner, who had been previously convicted of a felony, was in possession of a firearm. (C.T. 196-200.)2/ Petitioner entered a plea of not guilty as to all charges.

The special circumstance findings rendered Petitioner eligible for the death sentence under California law. Penal Code Section 190.2.

The jury recommended the penalty be death. The trial court imposed a sentence of death on July 7, 1988. (C.T. 1137-1139, amended at C.T. 1140-1142.) The California Supreme Court confirmed the convictions in their entirety.

V. STATEMENT OF THE FACTS

On the morning of September 15, 1986, the day of the homicides, Petitioner rode to the Roberts' neighborhood with several acquaintances, including Randal Ray Houseman, Jr. (R.T. 5071:7-22; 5112:3-9.) According to Petitioner's testimony at his trial, because Petitioner's probation officer had told Petitioner, at the request of Kathryn Roberts, to keep away from the Roberts' home, Petitioner asked Houseman to go to the residence to check on his girlfriend, Rebecca Palanuk, whom he heard was pregnant and whom he believed

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2/ C.T. refers to the Clerk's Transcript and to the Clerk's Augmented and Corrected Record.

was staying with the Robertses. (R.T. 5071:4-6; 5127:8-9; 5071:7-22; 5112:3-19.) While Houseman went to the residence, Petitioner waited at a corner bus stop at the end of the street. (R.T. 5073:23-5074:16.)

Petitioner testified that after a wait of approximately 45 minutes, he walked to the Roberts' residence. Upon his arrival, Petitioner found that the garage door had been forced open and a Model T replica had been loaded with various items of the Roberts' personal property. (R.T. 5076:11-15; 5078:14-23.)

Petitioner stated that he met Houseman coming out of the garage and Houseman told him no one was home. Houseman indicated that they should take the items that were in the garage and leave the premises. Petitioner then "hot wired" the Model T replica, after moving a VCR which was placed on the driver's seat by Houseman. (R.T. 5079:2-3.) Petitioner then drove away from the Roberts' house in the vehicle without having entered their living quarters. (R.T. 5079:17-5080:12.) Petitioner and Houseman then drove around Sacramento and spent the night at the home of Terry Wilson.

Petitioner and Houseman were arrested at Wilson's home the following morning. (R.T. 5088:24-5090:13.)

During the course of the proceedings, Petitioner tried on numerous occasions to replace his counsel. (R.T. 5-15; 85-96; 1973-1975; 2145-2153; 2295-2297.) Each of these attempts were rebuffed.

VI. HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner argued in the California Supreme Court that his convictions and death sentence were obtained in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by (1) the conflict of interest created by the fact that his trial and appellate counsel were each appointed directly by the courts in which his case was pending and were dependent on the favor of those courts for both remuneration and subsequent appointments, and (2) the fact that Petitioner was forced against his will to testify at his trial by the failure of the trial court and his counsel to advise him of his right not to take the stand and by his counsel's actions in telling the jury during opening statements what the content of Petitioner's testimony would be.

The California Supreme Court rejected each of these arguments. The court ruled that the appointment and remuneration of defense counsel by a court does not create a conflict of interest. (Appendix A at 22; 15 Cal.4th 997, 1029.) The court also ruled that Petitioner had not been coerced into testifying because he had consented to do so before the beginning of trial. (Appendix A at 24-27; 15 Cal.4th at 1030-1032.)

VII. REASONS FOR GRANTING THE WRIT

1. PETITIONER DEPRIVED OF HIS RIGHT TO COUNSEL AS GUARANTEED BY THE UNITED STATES CONSTITUTION BECAUSE THE COUNSEL WAS APPOINTED BY THE COURT BEFORE WHOM PETITIONER WAS TO BE TRIED CREATING A CONFLICT OF INTERESTS IN THAT APPOINTED COUNSEL WOULD BE BEHOLDEN TO THE JUDGES OF THE COURT WHICH APPOINTED SUCH COUNSEL TO REPRESENT PETITIONER.

By accepting remuneration for representation of Petitioner, Petitioner's appointed counsel both in the trial court and on his appeal to the California Supreme Court did not fulfill the requirements of the Sixth and Fourteenth Amendments to the United States Constitution, as interpreted by *Gideon v. Wainwright*, 372 U.S. 335; 83 S.Ct. 792 (1963), and subsequent cases dealing with the right to representation.

Because the People of the State of California were paying Petitioner's trial counsel, such trial counsel had an irremediable conflict of interest between the interests of Petitioner, who is being prosecuted by the People of the State of California, and the source of trial counsel's payments.

A defendant establishes a violation of the Sixth Amendment if he demonstrates that an actual conflict of interest adversely affected his counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 64 L.Ed.2d 33, 100 S.Ct. 1708 (1980).

Petitioner contends that the courts before whom he is appearing, first at the trial court in Sacramento County, and then the California Supreme Court, should not be involved in the selection, directly or indirectly, of the counsel chosen to represent him or of the method or amount of compensation. Petitioner's trial counsel was selected by the trial court, and Petitioner's appellate counsel appeared by appointment of the California Supreme Court. Because such counsel are appointed by the very courts before whom they are appearing, this necessarily inhibits such counsel from vigorously defending and protecting Petitioner's rights. Petitioner contends that this precluded Petitioner's trial counsel from vigorously objecting to the trial court's errors because they had a greater interest in receiving further appointments from the trial court and did not wish to prejudice their chance to obtain such appointments in the future.

Simply put, Petitioner contends that neither Petitioner's trial counsel nor Petitioner's appellate counsel were in a position to advance issues on Petitioner's behalf which might injure or decrease trial counsel's or appellate counsel's perceived ability to obtain future assignments from the appointing tribunal whose function it is to commission these attorneys to represent individuals situated similarly as Petitioner.3/ The more likely an appointed counsel would be

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3/ As much as a lawyer who represents two clients with opposed interests, counsel in this case "struggle[d] to serve two masters" -- his client and the court. *Cuyler*, 446 U.S. at 349, 64 L.Ed.2d 335, 100 S.Ct. 1708; *see*, *Glasser v. United States*, 315 U.S. 60, 75, 86 L.Ed. 680, 62 S.Ct. 457 (1942).

to advance positions favorable to Petitioner[4/] defeating the likelihood of conviction or the upholding of a conviction on appeal, the less likely that this same counsel would be appointed in the future to another case. As such, the appointed counsel has a fundamental conflict of interest between their current client and the counsel's hope for future clients through court appointment.

This Court should hold that appointments for trial and appellate counsel, and provisions for their award of fees, should be managed by some entity such as local and/or the State Bar Association rather than the courts before whom the appointed counsel is appearing.

2. PETITIONER WAS DEPRIVED OF THE FREE EXERCISE OF HIS RIGHT NOT TO TESTIFY BY THE ACTS OF HIS COUNSEL.

A defendant in a criminal trial has no obligation to testify if he does not wish to. U.S. Const. Amend. V and XIV; *Harris v. New York*, 401 U.S. 222, 225, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971). However, Petitioner's right to make this fundamental decision was exercised not by Petitioner, but by his counsel and contrary to his wishes. This fact was ignored by the trial court notwithstanding Petitioner's objection.

Before the defense opening statement Petitioner's counsel approached the bench and raised an issue regarding

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4/ Or, in the reverse, positions or issues which reflect critically on trial or appellate courts.

whether Petitioner would testify at the trial. (R.T. 4857:8; 4858:17-20.) Subsequent to some discussion on the issue, Petitioner's counsel stated that "we" (it is not clear to whom counsel was referring because Petitioner's two lawyers were involved in this discussion) have "resolved our problems as far as whether [Petitioner] would take the stand." (R.T. 4863:2-7.) The district attorney then stated that he believed that the record should reflect whether there was any disagreement regarding Petitioner testifying and that Petitioner should be advised of his rights in that regard. (R.T. 4863:9-12.)

The trial court, however, declined to advise Petitioner of his right not to testify claiming that to do so would be "ham-handed" and may "suggest what [Petitioner] should do or not do." (R.T. 4863:13-17.)5/ The court then addressed a question to Petitioner and his counsel: ". . . are you satisfied that you have been able to discuss to your satisfaction [Petitioner's] options, his tactical option and his legal options? Petitioner's *counsel* responded in the affirmative which elicited several questions from the trial court to Petitioner: "You don't have any concern about that, do you, Mr. Hines? You feel you're getting sufficient legal advise [sic] from one or both of your attorneys? You know you have a right to testify or a right to decline to testify; is that correct?" (R.T. 4863:18-4864:1.)

5/ Trial judges, of course, routinely advise defendants of their rights, for example, at the acceptance of a guilty plea, without "ham-handedly" "suggesting" anything.

After this question was put to him, Petitioner responded:

> Well, I know that, but I don't understand quite a bit when he gets --
>
> THE COURT: What's that again?
>
> THE DEFENDANT: I don't understand quite a bit of it once it gets down there to --.6/

Rather than responding to this obvious questioning by Petitioner as to what his rights were and his demonstration of his confusion over the very important issue at hand, the trial court plowed ahead, gave a confusing statement about a ruling the court had made and ended with the following question:

> THE COURT: Everybody happy, Mr. Macias and Mr. Holmes, and your client?
>
> MR. MACIAS: Yes.
>
> MR. HOLMES: Yes, Your Honor.7/

6/ At this point the trial court simply cut Petitioner off. (R.T. 4864:2-8.)

7/ Quite obviously, the question as to whether Petitioner was "happy" was either not addressed to, or if it was, not responded to by Petitioner. It is unlikely that Petitioner was "happy", given the circumstances.

> THE COURT: And you have had a fair and open discussion this morning. I don't want any criticism of Pope-type error three years from now that you two bludgeoned him into any course of action that he doesn't agree to.
>
> You're satisfied that you all discussed it?
>
> MR. MACIAS: Yes.
>
> THE COURT: I am going to take that at face value. I think for Mr. Gilmore and me to go beyond that at this point would be violative.8/

(R.T. 4864:7-28.)

The prosecutor, obviously recognizing the severity of the problem and its utter lack of proper resolution, again requested that before Petitioner's counsel addressed the jury the record reflect clearly that there was agreement between Petitioner and his counsel that Petitioner would testify. (R.T. 4865:1-8.) The trial court, rather than discussing this issue with Petitioner, simply ignored the prosecutor's request and stated, *incorrectly*, "I assume what these three gentlemen tell me, there is not a problem in that regard." (R.T. 4865:9-10.) In truth, Petitioner, presumably one of the "three gentlemen" referred to, *had* indicated, at minimum, his confusion on the issue which the trial court had refused to follow up on, and had never said that there was "not a problem."

8/ Violative of what we are not told.

The prosecutor, understandably still not satisfied that the issue had been resolved appropriately, offered to absent himself from chambers so that the subject of Petitioner testifying could be discussed outside of his presence and so that it could be clear that Petitioner understood his rights with respect to his exercising his right not to testify. However, rather than availing themselves of this opportunity, one of Petitioner's counsel again stated that he would resolve the issue with Petitioner. The Court took that at "face value", declining the prosecutor's offer and thanking him for his concern. (R.T. 4865:16-28.)

On the heels of this colloquy, the jury was brought in. Petitioner's counsel gave his opening statement during which he told the jury that Petitioner would be testifying. (R.T. 4870:22-23.)

Petitioner's concern about his testifying was again raised with the trial court. At the request of Petitioner, there was an *in-camera* session which commenced with Petitioner stating the issue thusly: "[w]ell, it's the matter of me testifying. It's already in front of the jury now."9/ (R.T. 4902:8-9.) According to Petitioner, one of his counsel told him that he had "no choice" and that he had to testify. (R.T. 4902:13-17.)

9/ Exactly the problem that both the prosecutor and Petitioner had earlier expressed concern over and exactly the problem the trial Court ignored and not a problem of Petitioner's making.

Petitioner pointed out to the trial court that the court had asked him a question about his testifying and that he had not responded.10/ (R.T. 4902:20-22.) Petitioner went on to articulate the dilemma in which he had been placed despite his timely attempts to resolve the issue prior to the matter having been raised in the opening statement. As Petitioner pointed out, the jury now anticipated that he was going to testify. (R.T. 4903:7-13.) The trial court then went on to tell Petitioner that in its view, Petitioner's counsel was not suggesting that he was under a legal compulsion to testify. The trial court also sought Petitioner's counsel's assent to this assumption. (R.T. 4904:1-18.) Remarkably, the trial court also seemed to indicate that Petitioner possessed sufficient knowledge to know how to exercise his Fifth Amendment rights. (R.T. 4904:22-27.)

The trial court, in an obvious attempt to browbeat Petitioner into a position stated: "But to suggest you have been railroaded into a quick decision because you never faced that prospect of whether or not you testify is, of course, utterly ridiculous and denied here by your two attorneys."11/ (R.T. 4906: 23-26.) The trial court then offered to instruct the

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10/ Petitioner noted that he had made some kind of gesture at the earlier discussion. It is unclear what the gesture was, but from the record it appears to have been consistent with signaling to the court Petitioner's confusion and resistance to testify. (R.T. 4902:24.)

11/ How the trial court could have any knowledge on the subject is not disclosed by the record.

jury on Petitioner's right not to testify and give an explanation to the jury that "*[t]he defense camp* has decided over the lunch hour to *change its tactics*." (Emphasis added.) (R.T. 4907:1-13.)

Petitioner responded that he had been trying to discuss the issue of his testifying with his attorneys and that he clearly had not had an adequate time to discuss and analyze the issue prior to the opening statement having committed him to testify. (R.T. 4907:23-4908:8.) The discussion continued with the resolution that it would be taken up over the recess before the next day's session and prior to the Petitioner testifying. (The discussion concludes at R.T. 4912.)

Subsequent to that *in-camera* hearing, Petitioner wrote a letter on this issue to the trial court. C.T. 000154-000155.12/ In his letter, Petitioner complained about the fact that his counsel had not spent time talking to him about his testifying, informed the trial court that his attorney had "told me I had to [testify]" and recited that counsel and he had only discussed this issue on one occasion. In support of this statement, Petitioner requested, in vain, that the trial court check the log book at the jail to confirm the infrequency of the visits by his counsel. (R.T. 4929:2-9.)

12/ While the letter was dated March 8, 1988 by Petitioner, it bears a notation that it was received on April 11, 1988, which is the day before the trial resumed on April 12, 1988, and appears to be the correct date. There were no proceedings on April 11, 1988.

The issue was discussed the following day, April 12, in a further *in-camera* hearing prior to Petitioner testifying. One of Petitioner's counsel informed the trial court that he had spoken with Petitioner and that he had told Petitioner that " . . . it was necessary for him to testify, because there is no other way for some of what we expected to be evidence to be presented to the jury." (R.T. 5026:28-29.)

As conceded by Petitioner's counsel, shortly before the opening statement, Petitioner had indicated that "he did not wish to testify." (R.T. 5027:5-7.) As Petitioner's counsel characterized it, there had been "something of an impasse since . . ." (R.T. 5027:9-12.) The trial court then went into a laudatory speech about the competency of Petitioner's counsel, again offering to give the jury an instruction on Petitioner's right not to testify. (R.T. 5027:13-5029:18.) The trial court concluded by stating:

> You folks better get together and put up our [sic] shut up in what you decide you want to do. I want to be as helpful as I can with the appropriate comment to the jury, if you elect not to testify. But, I emphasize, I am not trying to talk *either camp* into what position you ought to take. (Emphasis added.)

(R.T. 5029:19-23.)

Obviously, by characterizing Petitioner and his counsel as being in separate "camps", even the trial court recognized the danger of the situation confronting Petitioner in dealing with this very serious issue. However, consistent with his past practice, the trial court ignored Petitioner's concerns and rights.

Petitioner then inquired how the trial court could ameliorate this situation with the jury. The trial court responded:

> I will do whatever I can ethically to *minimize* any psychological impact [by your failure to testify]. I cannot guarantee you what the jury is going to believe, whether you do or do not testify.13/ (Emphasis added.)

(R.T. 5030:18-23.)

Petitioner's counsel then gave a self-serving statement to the trial court, relating to the decision for Petitioner to testify, noting that before the defense opening statement Petitioner was "vacillating a little bit" as to whether to testify. In fact, Petitioner's counsel told the trial court that just prior to his opening statement he had asked Petitioner: "Are you sure you're going to testify?" And he then stated:

> So when I stood up and started talking to the jury, that was it.
>
> *I had to make a decision, so I told Mr. Hines we are locked in.* We're -- all systems are go and I'm going to tell them what you are going to say. -- *We are still trying to talk him into taking the stand.* He knows he has the final say. (Emphasis added.)

13/ This statement is a recognition that the damage had been done by this point.

(R.T. 5031:8-5032:1.)

The trial court terminated this *in-camera* hearing with the following confusing statement:

> I am simply, as a matter of raw courtesy, suggesting to Mr. Hines, non-lawyer, that if he feels some undue impact of your opening statement, that a bell that can't be unrung, that's why I made my offer to do it from the objectivity of the bench with that instruction about option to testify or not to testify.

(R.T. 5032:2-11.)

There was no further discussion on the record prior to the time Petitioner testified.

A review of the trial transcript and Petitioner's letter to the trial court on the issue of testifying demonstrates that the matter was handled in such a way as to deprive Petitioner of any meaningful right to choose whether or not to testify. A review of Petitioner's trial testimony reveals a confused witness who, albeit he denied culpability for any crime other than auto theft, surely did not make a favorable impression with the jury and clearly was inadequately prepared by his appointed counsel. (R.T. 5056-5242.)

The correct choice, Petitioner's choice, was not to testify. Not only did this have a detrimental effect in the guilt phase of the trial, it most likely carried even over to the penalty phase.

3. CAPITAL DEFENDANTS IN CALIFORNIA ARE DENIED DUE PROCESS OF LAW BY THE REFUSAL OF THE CALIFORNIA SUPREME COURT TO APPLY ITS STATUTORY POWER TO REDUCE CRIMINAL SENTENCES TO CASES IN WHICH THE DEATH PENALTY HAS BEEN IMPOSED.

Under California law, both trial and appellate courts have statutory powers to reduce the punishment imposed on criminal defendants. Section 1181 (7) of the California Penal Code provides:

> When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or by jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

California Penal Code section 1260 states:

> Rulings by appellate court. The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for

such further proceedings as may be just under the circumstances.

The two statutes make no distinction between death-sentenced and non-capital defendants. Under their terms, any defendant is entitled to have the reviewing court consider reducing his punishment; in the language of section 1181(7), "this power *shall* extend to any court to which the case may be appealed." (Emphasis added.)

Despite this clear language and over repeated dissents, a majority of the California Supreme Court has consistently refused to exercise its power, or even to acknowledge it, in capital cases, including that of petitioner. Appendix A, pp. 98-99; 101-106; *People v. Hines*, 15 Cal.4th 1079-1080 and 1081-1084, and cases cited therein.

The statutes quoted above establish a procedural entitlement that is protected by the due process clause. *Hicks v. Oklahoma*, 447 U.S. 343, 65 L.Ed.2d 175, 100 S.Ct. 2227. "Where a statute indicates with 'language of an unmistakable mandatory character' that state conduct injurious to an individual will not occur 'absent specified substantive predicates' the statute creates an expectation protected by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 428, 91 L.Ed.2d 335, 358, 106 S.Ct. 2595 (1986) (conc. opinion of O'Connor, J.). The refusal of the California Supreme Court to acknowledge or employ its power under sections 1181(7) and 1260 constitutes an arbitrary deprivation of that constitutionally-protected expectation, in violation of the due process clause of the Fourteenth Amendment.

Capital defendants also possess the right, under the Eighth Amendment and the Due Process Clause, to

meaningful appellate review. *Parker v. Dugger*, 498 U.S. 308, 321, 112 L.Ed.2d 812, 821, 1115 S.Ct. 731 ["We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."] The California court's refusal to employ its statutory right of review deprives capital defendants of that entitlement, as well, increasing the risk that California's capital charging and sentencing system, already unable to separate defendants deserving of death from those who are not, *Tuilaepa v. California*, 512 U.S. 967, 129 L.Ed.2d 750, 767-774, 114 S.Ct. 2630 (1994) (diss. opinion of Blackmun, J.) will randomly condemn even more.

Petitioner therefore respectfully requests that this petition for certiorari be granted.

Respectfully submitted,

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